United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

996

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN HENRY MORGAN

Appellant

v.

Appeal No. 21019

UNITED STATES OF AMERICA

Appellee

APPELLANT'S BRIEF

MARK B. SANDGROUND, ESQ.
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Washington, D. C. 20005
Counsel for Appellant

Of Counsel:

Jack C. Sando, Esq.

I. STATEMENT OF QUESTIONS PRESENTED

1. The question is whether evidence recovered as the result of a wrongful arrest is admissible at trial?

2. The question is whether a trial court may fail to exercise any discretion in permitting evidence of prior convictions to be introduced on the issue of defendant's credibility?

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IV. JURISDICTIONAL STATEMENT

This is an appeal under 28 U. S. Code Sections 1291 and 1915 from a conviction in the United States District Court for the District of Columbia. On April 1, 1966, appellant, John H. Morgan, was sentenced to imprisonment for five (5) years having been adjudged guilty by a jury of violating Title 26 of U. S. Code Section 4704(a) and Title 21 U. S. Code Section 174. On March 3, 1967, this Court granted an appeal.

V. STATEMENT OF CASE

1. On August 6, 1965, appellant was indicted for violation of Title 26 U. S. Code 4701 (a) (possession of a narcotic drug) and Title 21 U. S. Code 174 (facilitation of concealment and sale of narcotic drug, knowing same to have been imported contrary to law). On the 15th day of October, 1965, appellant entered a plea of not guilty and on February 23, 1966, the matter came to trial, in the United States District Court sitting with a jury.

2. The testimony of the Government's witnesses was that on August 6, 1965, at 2:30 P.M. in the afternoon, Detective Clyde E. Rice, assigned to the Narcotics Squad

of the Metropolitan Police Department and Detective Rufus Moore were cruising in the area of the 1900 Block of 14th Street, N. W. in the District of Columbia (R-8). They alighted from their car in front of Brown's Restaurant at 1910 14th Street, N. W., went into the restaurant, made observations and left the restaurant (R-9). Upon leaving the restaurant, they allegedly observed the appellant standing "about two doors down talking to two or three subjects, and these subjects and the defendant looked up and recognized us, they all began to walk away". (R-9) Detective Moore allegedly called to appellant and appellant started to run south on 14th Street with the detectives in chase. Appellant allegedly moved to the corner of 14th and T Streets, N. W. and made a right turn, went two steps and pulled his hand from his left pocket throwing a green cigarette package to the ground (R-9). . .Police officer Rice allegedly observed that as the package hit the ground " a number of white decks containing white powder, fell to the ground" (R-9).

Detective Moore allegedly caught up with the appellant, who was running on one crutch and placed him under arrest in front of 1910 14th Street, N. W. (R-10). The package was allegedly under the constant observation

of Detective Rice, until the time it was recovered by him (R-10). Detective Rice turned over the package at a later time to the United States Chemist (R-11), after the package had been initialed by the police officers. The package allegedly carried no tax paid Federal stamps appropriate for narcotic drugs (R-13).

At the time Detective Rice first observed the appellant standing on 14th Street, the appellant was committing no offense. Prior to the time Detective Moore called to him, he had committed no offense (R-14). The Court ruled at the trial that if the police officers had caught the appellant and he had the "stuff" on him, and they searched him, it would have been an illegal search and seizure" (R-23).

The Court ruled, as a matter of law, that Detective Moore had proper cause for the arrest (R-31). John Adams Steele, a government chemist, identified the material in the cellophane bags as 20.8% heroine hydrocloride, a derivative of opium, a narcotic drug (R-36). The Court knew that the appellant had a prior felony record (R-26). The Court was apprised that the appellant was going to take the witness stand in his own behalf (R-37). The Court held no hearing on whether the appellant's prior criminal record could be

used by the government to impeach his credibility.

The appellant, testifying in his own behalf, stated that on the 6th day of August, 1965, he was standing at the corner of 14th & T Streets, N. W. speaking with two other people when he was approached by the officers (R-38-39). They did not place him under arrest at that time (R-39). He observed the officers running out of Brown's Restaurant and he, in a group of four or five other people, moved out of the way (R-40). He had not gone over three steps when he was knocked down and placed under arrest by Officer Moore (R-41). Appellant did not observe the cellophane bag but testified that a little boy standing at the bus stop had the cellophane package in his hand, and Officer Rice went over and asked him what it was, took it from him and was told that "one of the men dropped this, was running" (R-43). Appellant denied dropping the package, claiming that the only time he had seen it was in the hands of Officer Moore at the Police Precinct, not at the scene (R-44). Appellant walks on one crutch which at the time of the arrest was under his right arm (R-44-45). At the time appellant was placed under arrest, according to his testimony, police officers had not found anything R-47-48).

Appellant was one of a crowd that was fleeing from the police officers (R-48-49).

On the basis of this testimony, the Court submitted the issue to the jury, instructing them as to the law. The jury returned the verdict of guilty.

VI. STATEMENT OF POINTS

1. It was error for the trial court to admit the evidence of narcotics recovered pursuant to a wrongful arrest.

2. It was error for the trial court not to exercise any discretion in permitting evidence of the prior conviction for robbery.

VII. SUMMARY OF ARGUMENT

1. At best, the record is unclear as to the time that Officers Moore and Rice arrested John H. Morgan. If, as Officer Moore's testimony strongly indicates, John H. Morgan threw a "small cellophane bag" to the ground after being placed under arrest for which the two officers had no probably cause, then the evidence in that bag was clearly inadmissible and the prosecution has no case.

2. The trial court either failed to exercise, or

abused, its discretion when the prosecution attempted to impeach the credibility of defendant on the basis of a robbery conviction some eleven years earlier and wholly unrelated tothe crime for which defendant was indicted. In view of the emphasis which the trial court placed on this robbery conviction, during the charge to the jury, the evidence of this prior conviction was clearly prejudicial.

VIII. ARGUMENT

A. THE EVIDENCE OF NARCOTICS, INTRODUCED BY THE GOVERNMENT AT TRIAL, SHOULD HAVE BEEN DECLARED INADMISSIBLE AS THE FRUIT OF AN UNLAWFUL ARREST

With respect to point 1, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 21, 23, 41, 46, 47, 49.

The testimony of Officer Rufus Moore on direct examination is crucial:

> "We caught up with Mr. Morgan at the corner of 14th and T, and upon so doing he took from his left front trouser pocket a small cellophane bag and threw it to the sidewalk, and at this time Officer Rice recovered the cellophane bag, and at the same time he threw it, that Mr. Morgan threw the bag to the ground, he wheeled and started to run back north in the 1900 block of 14th Street. As Officer Rice recovered the small cellophane bag he hollered to me. . .

"Q After he hollered to you, what did he (sic) do?

"A After Officer Rice hollered to me?

"Q Right.

"A I then caught Mr. Morgan and placed him under arrest." (R-21)

The trial court was satisfied that,

"If they had caught him and he had the stuff on him, and they searched him, it would have been an illegal search and seizure. But as they were chasing him he threw the package to the ground. He wasn't under arrest at that time." (R-23)

It is submitted that the trial court's determination of the time that the arrest took place is based on Officer Moore's conclusion, and not on the events related by him. Officer Moore claimed that he and Officer Rice "had caught up with Mr. Morgan". Yet no inquiry is made as to whether the Officers physically grasped Mr. Morgan, or whether the Officers were now merely parallel to Mr. Morgan. Instead, the trial court accepts as conclusive Officer Moore's characterization of the arrest as occurring after Officer Rice recovered "the small cellophane bag".

If either or both of the Officers aimed a pistol at, or placed hands upon, Mr. Morgan, an arrest was made before any bag was discarded. In Rios v. United States, 364

U.S. 253 (1960), state police officers followed a taxicab to a red light, then stepped out of their cruiser and approached the rear of the taxicab where Rios was seated. Rios dropped a container to the floor of the taxicab and was convicted on an indictment similar to that in the instant case. The Supreme Court remanded the case to the trial court for a determination as to the time an arrest was made. The cab driver and defendant testified that the policeman had opened the door and/or reached into the cab and grasped defendant's arm. The Supreme Court held,

> "If. . .the arrest occurred when the officers took their positions at the doors of the taxicab, then nothing that happened thereafter could make that arrest lawful, or justify a search as its incident." 364 U.S. 261-262.

If, in the instant case, an arrest was similarly made before Mr. Morgan allegedly discarded a "cellophane ba_", then any evidence relating to that "bag" must be inadmissible.

Mr. Morgan testified that as soon as Officer Moore caught up with him, Officer Moore "picked me up and put a gun in my head and said, 'You come along here.' "(R-41, see also R-46, 47, 49.)

The Government introduced no evidence that Officer Moore had probable cause to arrest Mr. Morgan,other

than that Mr. Morgan discarded a "small cellophane bag". If Officer Moore and/or Officer Rice made the arrest before any bag was even allegedly discarded, then that bag and its contents and any testimony pertaining thereto are inadmissible evidence.

B. THE FAILURE OF THE TRIAL COURT TO EXERCISE ANY DISCRETION IN PERMITTING EVIDENCE OF A PRIOR CONVICTION TO BE INTRODUCED ON THE ISSUE OF DEFENDANT'S CREDIBILITY WAS REVERSIBLE ERROR

With respect to point 2, appellant desires the court to read the following pages of the reporter's transcript: Tr. 50, 51, 77, 78.

In order to impeach the credibility of Mr. Morgan, the Government questioned him about a conviction for robbery in 1955. (R-50, 51) The trial court did not ask counsel to approach the bench and did not ask the Government to show the relevancy of its interrogation. Instead, nearing the end of the charge to the jury, the court stated as follows:

> "What you have got to determine, ladies and gentlemen of the jury, is where did the heroin hydrochloride come from? Did the defendant have possession of it, or didn't he? If he did, you may convict. If he didn't, you can't convict.
>
> "Now, it is as simple as that. Who are you going to believe?

"There has been introduced into this trial a criminal record of the defendant. He had a prior conviction of robbery.

"Now, you are not to consider that because the man has violated the law in the past, it follows from that, that he must be guilty of this violation. The only purpose of the introduction of a criminal record on the defendant, or any witness for that matter, goes to the credibility of the witness.

"In other words, you can ask yourself this question, would you place as much credence in the testimony of a person who has been convicted of crime in the past as you would in the testimony of a witness who has never been convicted of any crime." (R-77, 78)

The failure of the trial court to consider this prior conviction according to the rather clear standards set down in Luck v. United States, 121 U. S. App. D.C. 151, 343 F. 2d 763 (1965), was itself, under the circumstances, reversible error. The prejudicial nature of this evidence is obvious from the trial court's charge.

In Luck, this Court held that the trial court had not abused its discretion by admitting evidence of prior grand larceny convictions, in a case where the defendant had been indicted for housebreaking and larceny. The court held,

> "In exercising discretion in this respect, a number of factors might be relevant, such as the nature of the prior crimes, the length of the criminal record, the age

> and circumstances of the defendant, and, above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction. . ." 348 F. 2d at 769.

In the instant case, the Government asked questions about one conviction for an eleven-year-old crime totally unrelated to the matter for which Mr. Morgan was indicted. From the bare face of the question as to a robbery conviction in 1955, none of the factors listed in Luck appear to have been considered. Certainly, the trial court gave no indication that the Luck opinion had any vitality.

As Judge Fahy pointed out, in Stevens v. United States of America (No. 19,883),

> "A serious question of fundamental unfairness arises when an evidentiary rule may deter a defendant from testifying in his own behalf or if he does testify subjects him to evidence highly prejudicial on the issue of guilt though inadmissible for that purpose.
>
> ". . .the treatment accorded the subject by Judge McGowan in Luck, when adhered to, mitigates the danger, and it seems to me, calls upon the trial court to exercise the discretion there referred to even if counsel is not aware of its applicability."

If the Luck opinion requires anything more than silence from the trial court as to the admissibility of evidence of prior convictions, then it is submitted that

the trial court in this case failed to exercise its discretion, and the introduction into evidence of the robbery conviction was prejudicial and reversible error.

C. CONCLUSION

The indictment of John H. Morgan stemmed from evidence of narcotics which should never have been admitted at trial, if its recovery resulted from a wrongful and unlawful arrest. Officer Moore's testimony indicates that a wrongful arrest was actually made. At best, the facts of arrest are undetermined.

The defense of John H. Morgan was seriously prejudiced by the introduction into evidence, and the emphasis placed by the trial court, on a prior conviction many years earlier and wholly unrelated to the crime for which John H. Morgan was indicted.

Wherefore, it is respectfully submitted that this Court reverse the conviction of John H. Morgan as the result of prejudicial and reversible error under the rule of Luck v. United States, or in the alternative, remand for the purpose of determining when the arrest of the appellant took place under the rule of Rios v. United States.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,019

JOHN HENRY MORGAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Cr. No. 1109-65

QUESTIONS PRESENTED

In the opinion of the appellee the questions presented are:

1. Was it reversible error for the trial court to admit evidence relating to the seizure of narcotics abandoned by appellant while attempting to evade arrest?

2. Was it reversible error for the trial court to permit the Government to impeach appellant's credibility with proof of a prior conviction where appellant's trial counsel did not request a *Luck* inquiry and made no objection to the testimony relating to appellant's prior conviction in the court below?

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TABLE OF CASES

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On February 23-24, 1966 appellant was tried before a jury in the United States District Court for the District of Columbia under a two count indictment charging (1) that on or about August 6, 1965 appellant purchased, sold, dispensed and distributed, not in the original stamped package, and not from the original stamped package, seventeen capsules and ten envelopes containing a narcotic drug (26 U.S.C. § 4704(a)) and (2) that on or about the same date the appellant facilitated the concealment and sale of a narcotic drug, *i.e.*, seventeen

capsules and ten envelopes containing a narcotic drug which had been imported into the United States contrary to law, with the knowledge of appellant (21 U.S.C. § 174). Appellant was found guilty on both counts and sentenced to a term of imprisonment.[1]

The record discloses the following pertinent facts. Detective Clyde E. Rice assigned to the Narcotics Squad of the Metropolitan Police Department testified that on August 6, 1965 at about 2:30 p.m. he and Detective Moore were cruising in the area of the 1900 block of 14th Street, N.W. (Tr. 7-8). At Brown's Restaurant located at 1910 14th Street they stopped and went into the restaurant. When they came out they observed appellant standing with several other persons. Detective Moore called appellant, stating that he wanted to speak to him; whereupon appellant commenced running south on 14th Street (Tr. 9). Both officers followed and at 14th and T Streets appellant turned right. A few steps from the corner he pulled a package from his left pocket and threw it to the ground. As the package hit the ground a number of gelatin capsules containing a white powder and a number of packages containing a white powder fell to the ground (Tr. 9). Officer Rice stopped and recovered the capsules and packages and called to Officer Moore telling the latter that they appeared to contain narcotics (Tr. 10). Officer Moore followed appellant and placed him under arrest (Tr. 10, 17). Officer Rice also testified that neither the capsules nor the packages had on them any tax paid Federal stamps appropriate for narcotic drugs (Tr. 13).

Officer Rufus Moore, also assigned to the Narcotics Squad of the Metropolitan Police Department testified substantially the same as Officer Rice. He confirmed the fact that appellant ran when he called to him and that at the corner of 14th and T Streets he took a small

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[1] A sentence of five years was imposed, the minimum required by law for violation of Count 2 of the indictment (21 U.S.C. § 174).

cellophane bag from his left front trouser pocket and threw it to the sidewalk (Tr. 21). He stated that Detective Rice recovered the cellophane bag and its contents and called to him that it contained narcotics (Tr. 21, 30). Officer Moore continued running after appellant and arrested him (Tr. 21). Officer Moore also testified that the capsules and packages were submitted for chemical analysis to Dr. John Steele, a chemist employed by the United States Treasury Department (Tr. 25).

Dr. John Adams Steele testified that he is employed as an analytical chemist by the Internal Revenue Service, Alcohol and Tobacco Division; that he specializes in the analysis of dangerous drugs; that he analyzed the contents of the capsules and decks given him by Officer Moore; and that they contained 20.8 percent heroin hydrochloride, an opium derivative, a narcotic drug and manitol (Tr. 34-35).

Appellant claimed that he was standing at 14th and T Streets talking with two other people on the day in question (Tr. 38); that he observed the officers running out of Brown's Restaurant and that he moved out of their way and was knocked down by someone who was running; that Officer Moore picked him up and put a gun to his head (Tr. 41) and that he did not know where the cellophane bag of capsules came from (Tr. 42). He stated also that Officer Rice got the cellophane bag from a little boy who was standing at the bus stop who said one of the men who was running dropped it (Tr. 43). Appellant denied that the packets of narcotics were his (Tr. 44). He testified that at the time he was arrested by Officer Moore neither officer had found the cellophane bag containing the narcotics (Tr. 47-48).

On cross-examination the Government's attorney impeached appellant's credibility by showing a prior conviction for robbery in 1955 (Tr. 51). Appellant's counsel did not object to the introduction of evidence relating to appellant's prior conviction and made no effort to invoke the trial judge's discretion on the point (Tr. 50-51).

STATUTES INVOLVED

Title 14, District of Columbia Code, Section 305, provides:

> A person is not incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime. The fact of conviction may be given in evidence to affect his credibility as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him is not bound by his answers as to such matters. To prove the conviction of crime the certificate, under seal, of the clerk of the court wherein proceedings containing the conviction were had, stating the fact of the conviction and for what cause, is sufficient.

Title 21, United States Code, Section 174, provides:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

> For provision relating to sentencing, probation, etc., see section 7237 (d) of the Internal Revenue Code of 1954.

Title 26, United States Code, Section 4704(a), provides:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prime facie evidence of a violation of this subsection by the person in whose possession the same may be found.

SUMMARY OF ARGUMENT

I

Testimony relating to a package of narcotics which appellant threw from his pocket just prior to his arrest is admissible in evidence since the incriminating evidence was thus abandoned. The subsequent arrest was valid and not in violation of appellant's constitutional rights.

II

Impeachment of appellant's credibility by proof of appellant's prior felony conviction was not reversible error where appellant's trial counsel did not request a preliminary *Luck* inquiry and did not object to the admission of testimony relating to appellant's prior conviction of a felony.

ARGUMENT

I. Testimony relating to the narcotics seized by the arresting officers was properly admitted in evidence since the narcotics had been abandoned by appellant and were not the fruit of an illegal arrest.

(Tr. 7, 9, 10, 20, 21, 41-45)

It is clear from the testimony of the arresting officers that appellant when hailed by Officer Moore ran towards 14th and T Streets and that when he reached the intersection he removed a cellophane bag from his trouser pocket and threw it to the ground, thus abandoning the evidence which later proved to be narcotics (Tr. 9-10, 21). (Not even appellant's version of the events claimed that the narcotics were taken from appellant's person either before or after the arrest was made (Tr. 41-45).) The testimony of both Officer Rice and Officer Moore, which the jury accepted, supports the conclusion that appellant was arrested only after he had abandoned evidence which Officer Rice, an experienced member of the Narcotics Squad, had reasonable ground to believe were narcotics (Tr. 9, 10, 21). In these circumstances, appellant's arrest which followed was lawful. The testimony relating to the evidence found before that arrest was clearly admissible. *William M. Rouse, Jr.* v. *United States*, 123 U.S. App. D.C. 348, 259 F.2d 1014 (1966); *Abel* v. *United States*, 362 U.S. 217 (1960); *Hester* v. *United States*, 265 U.S. 57 (1924); *Jackson* v. *United States*, 112 U.S. App. D.C. 190, 301 F.2d 515 (1961), *cert. denied*, 369 U.S. 859 (1962); *Lee* v. *United States*, 95 U.S. App. D.C. 156, 221 F.2d 29 (1954); *Burton* v. *United States*, 272 F.2d 473 (9th Cir. 1959), *cert. denied*, 362 U.S. 951 (1960).

Appellant argues that "if" the arrest was made before he discarded the cellophane bag, then the arrest was illegal (App. Br. 7-9). This argument is based on unacceptable speculation and is entirely irrelevant since the evidence, taken in the light most favorable to the Govern-

ment,[2] clearly shows and the jury believed that the arrest was made after Officer Rice recognized the contents of the cellophane bag as narcotics (Tr. 9, 10, 21).

II. The proof of a prior conviction offered by appellee to impeach the appellant's credibility was properly received in evidence.

(Tr. 37, 45-51)

Appellant argues that the trial court's failure to conduct a *Luck* inquiry outside of the jury's presence, before the Government impeached the appellant by showing a prior conviction, is reversible error. This argument is wholly lacking in merit. The record shows that appellant testified on direct examination after he was advised by his trial counsel not to do so (Tr. 37) and it is thus reasonable to assume that appellant's counsel was fully aware of the possibility that appellant's credibility could be impeached by the Government. Nevertheless appellant's counsel made no request that the trial court exercise its discretion and prohibit appellant's impeachment by this method (Tr. 45-51) and there was no objection made by appellant's counsel when the Government's attorney introduced impeachment evidence (Tr. 50-51). *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965) held that the trial court could exercise its discretion in permitting impeachment of a defendant by proof of prior convictions and suggested certain criteria which the trial court should use as a guide in the exercise of its discretion. *Luck* did not hold, as appellant now urges, that the trial court is required to initiate *sua sponte* a preliminary inquiry in order to determine whether or not to permit such impeachment (App. Br. 9-10). Subsequent decisions by this Court have made it clear that the defendant's counsel, not the court, must invoke the court's

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[2] *Glasser* v. *United States*, 315 U.S. 60 (1942); *Crawford* v. *United States*, —— U.S. App. D.C. ——, 375 F.2d 332 (1967); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).

discretion. These decisions hold further that where no objection is made at the trial, it is not plain error for the court to permit this form of impeachment. *Covington* v. *United States*, —— U.S. App. D.C. ——, 370 F.2d 246 (1966); *Hood* v. *United States*, —— U.S. App. D.C. ——, 365 F.2d 949 (1966); *Walker* v. *United States*, 124 U.S. App. D.C. 194, 363 F.2d 681 (1966). The quotation from *Stevens* v. *United States*, —— U.S. App. D.C. ——, 370 F.2d 485 (1966) cited by appellant (App. Br. 11) is not the prevailing rule in this jurisdiction but is an excerpt taken from the dissent written by Judge Fahy in that case.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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